Timken Roller Bearing Co. v. U.S. No. 352,O.T.'50

This is the reply brief to the Government's opposition to the motion filed in District Court. It should be attached to the pending motion to postpone oral argument.

EXHIBIT C.

(Filed in the District Court March 9, 1951.)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

CIVIL ACTION No. 24,214.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE TIMKEN ROLLER BEARING COMPANY,
Defendant.

REPLY TO PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION TO MOTION THAT THIS COURT ASK LEAVE OF THE SUPREME COURT OF THE UNITED STATES TO CONSIDER APPELLANT'S MOTION THAT THIS COURT RECEIVE ADDITIONAL EVIDENCE AND RECONSIDER ITS FINAL JUDGMENT HEREIN AND, IF LEAVE BE GRANTED, THAT THIS COURT PROCEED TO DO SO, BECAUSE OF CHANGED CIRCUMSTANCES DUE TO THE DEATH OF MICHAEL B. U. DEWAR SINCE THE PERFECTION OF AN APPEAL HEREIN TO THE SUPREME COURT OF THE UNITED STATES.

NOW PENDING ON APPEAL IN THE SUPREME COURT OF THE UNITED STATES.

I.

THE PROCEDURAL QUESTION.

In our "Statement of Reasons Supporting Motion," filed with the defendant's motion, we set forth numerous authorities supporting the procedure defendant has adopted in cases where developments while an appeal was pending made some action by the trial court appropriate.

These authorities are fully discussed in our main brief, and it is not necessary to add to that discussion.

The soundness of our contentions is made evident when it is remembered that the trial court, under the proposed procedure, reconsiders the judgment entered in this case after proof as to the new facts and circumstances has been adduced. It is, of course, eminently proper that this proceeding be had in the trial court, for that court, having considered the case originally, is better qualified than the appellate court, which has not yet done so, to determine the effect of the new circumstances on its judgment. Conceivably, action in the trial court could alter the entire basis of the appeal, making the decision of the appellate court, based on the original facts and the original judgment, wholly academic. Therefore, once jurisdiction has been transferred to the appellate court, before the trial court may act, it must be authorized to do so by the appellate court.

While the position of the plaintiff is not too clear on the procedural question, it seems to be the plaintiff's suggestion in its argument on pages 12 to 15 of its memorandum that the appellate court should first hear and consider the new evidence. One objection to this method of handling this matter is that it would require the appellate court, as to the matters involved in the motion, to act as a court of first instance, and to pass upon questions as to which the trial court has had no opportunity to act. This is something far different from simply modifying the decree of a trial court which itself has had every opportunity to consider all the facts which later come before the appellate court, and is not properly the function of the appellate court. Another objection is that there is no authority for such action by an appellate court.

Indeed, plaintiff does not seriously challenge the propriety of the procedure which defendant seeks to have followed here. Plaintiff does argue (page 12 of its memorandum) that this procedure will not prevent delay and

prolixity in the final disposition of this cause. It is suggested that the Supreme Court could itself make any modifications in the decree which it saw fit by reason of the new developments in the case, or could simply affirm the decree of this Court if it concluded that no modifications were called for by the changed circumstances, or that it could "remand only the provisions affected to this Court for reconsideration." Of course, if we assume as plaintiff apparently does, that the changed circumstances do not affect the result of this case, then it is true that this proceeding in this Court would simply delay the final disposition of this case. On the other hand, if, as we believe, the death of Dewar *and the acquisition by the defendant of his interests in British Timken and French Timken*[1] change the entire factual situation and the legal problems involved in this case, then certainly it is more expeditious to have this Court reconsider the case now, and to postpone the review by the Supreme Court until it has the current situation, and this Court's judgment thereon, before it in the record. We cannot believe that in such a case as this the Supreme Court would wish to have the burden of reviewing a decree based upon one set of circumstances, and modifying it to a new factual situation, without having the judgment of this Court on the effect of the changed circumstances. If the judgment is to be modified because of the changed circumstances, it will be done by this Court, either before review by the Supreme Court, or upon remand by that Court. If the latter, then the modified decree of this Court may itself be subject to review, at the instance of either the plaintiff or the defendant. Then, finally, the case will be disposed of. Certainly it will be more expeditious, more considerate of the time of the Supreme Court, and more in keeping with the proper functions of this Court and the Supreme Court, for this Court to reconsider its judg-

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[1] Emphasis throughout is supplied unless otherwise indicated.

ment in the light of the changed circumstances *before* the Supreme Court is asked to consider this case on appeal.

Plaintiff argues that this procedure should not be allowed to delay the hearing on appeal "merely to place in the record a fact which could be covered by a stipulation or affidavit filed in the Supreme Court." However, as has been emphasized repeatedly, the purpose of this proceeding in this Court is *not* "merely to place in the record" new and additional facts. It is rather to permit this Court to consider the effect of these facts upon its judgment entered prior to the change of circumstances. We have shown that this method of procedure is the most expedient for this purpose.

Moreover, the authorities which plaintiff cites to show that new facts, not in the record, will be considered by the Supreme Court, if presented by affidavit or stipulation, are far from convincing on this point.

It is not at all clear from the opinion in *Automatic Radio Mfg. Co. Inc. vs. Hazeltine Research Inc.*, 339 U. S. 827 (1950), (cited in plaintiff's memorandum at page 15, note 6) that the affidavit which the Supreme Court mentions was not part of the record in the case from the lower courts. That case was heard on motions for summary judgment filed by both parties, with affidavits in support of the motions. Thus, the affidavits themselves constituted the record in the case; and from the opinion of Mr. Justice Minton it is impossible to tell whether the particular affidavit to which he refers at page 835 (stating that Hazeltine had authorized its licensees to discontinue a notice restricting the use of the patented apparatus—one of the facts upon which Automatic based its claim of illegal use of the patent) had been filed in the District Court or only in the Supreme Court. There is nothing in the opinion to lead us to the latter conclusion.

The only other case cited by plaintiff on this point is *United States vs. Aluminum Company of America*, 148 F. (2nd) 416 (C. C. A. 2, 1945). The consideration of facts

outside the record in that case, in the words of the Court itself, depended on the doctrine of judicial notice. That was an unusual case because of the extremely long time which had elapsed between the closing of evidence and the consideration of the appeal—nearly five years—and because during that time, as the Court says, the aluminum industry had been revolutionized by reason of the war. These factors made it especially appropriate that the appellate court bring itself up to date on the facts, and apparently no attempt had been made to accomplish this by a proceeding in the District Court. Therefore, the Court took notice of facts appearing in a Congressional Committee report.

Neither party raised any question as to the propriety of the appellate court's taking judicial notice of the facts which it considered. To the contrary, they asked it to take such notice of certain facts. Certainly there is nothing in the case at bar comparable to the Congressional Committee report from which the Supreme Court, even were it so inclined, could take judicial notice of the fact of Dewar's death or of defendant's acquisition of his interests in British Timken and French Timken.

The only other authorities cited are law review notes which see "no good reason for not permitting them (new facts) to be proved in the reviewing court." The obvious answer to this is that it is not the proper function of a reviewing court to take evidence or to determine, in the first instance, the legal conclusions which follow therefrom. Moreover, in the cases cited in our main brief, the Supreme Court has said that it will not consider additional evidence not in the record certified to it from the trial court.

Finally, it is stated that the Supreme Court accepts facts which render a case moot; but that is a problem far different from the one here involved, and its solution depends on completely different considerations.

In short, we submit that there is no recognized appropriate method, other than that which defendant has fol-

lowed, for bringing the changed circumstances in this case to the attention of the Supreme Court, and, as we have already pointed out, accomplishing the further and broader purpose of this proceeding, namely, to have a reconsideration of the case by this Court. This ultimate object cannot possibly be accomplished unless this Court obtains authority from the Supreme Court to take additional evidence *and* to reconsider its judgment herein. We believe there can be no doubt that the procedure which we have asked the Court to adopt is approved by competent authorities and is best adapted to permitting this Court to take the action in this case which, upon full consideration of the changed circumstances, it may deem appropriate with respect to its judgment herein.

II.

THE EFFECT OF THE CHANGED CIRCUMSTANCES ON THE MERITS AND FINAL JUDGMENT IN THIS CASE.

By far the larger portion of plaintiff's memorandum is directed to the substantive, rather than the procedural, aspects of defendant's motion. It is somewhat difficult to discuss the substantive question without a definite set of facts as the basis for the discussion; and these, of course, will be preesnted to the Court only after it decides the present motion. Presumably, we can treat this in the same manner as a motion to dismiss, and assume that for the purposes of this motion the facts stated therein are admitted to be true. These facts may be sufficient to show that there is probable cause for reconsidering the decree in this case; but we believe there will be other facts which will have to be considered before the Court can determine the appropriate decree to enter under these changed circumstances, and some reference may be made to these in our discussion.

Dewar's death, in itself, of course, is not the only important fact. The facts of ultimate importance are that his death necessarily ends the joint venture between him and the defendant with respect to British Timken and French Timken; that his interests in those companies will now be acquired by the defendant, in all probability, and his control and management transferred to the defendant; and that British Timken and French Timken will now become, for the first time, true subsidiaries of the defendant. Questions as to restraints of trade imposed by contract between defendant, Dewar, British Timken and French Timken, now become secondary; and the primary question is whether defendant's acquisition of ownership control of these companies is illegal. Furthermore, the acquisition of these controlling interests represents the culmination of the joint venture and the fulfillment of its ultimate purpose, namely, the extension of defendant's business of manufacturing and selling tapered roller bearings into foreign countries, and thus permits a reevaluation of the course of conduct which was followed in all the relations between defendant, British Timken and French Timken.

It is contended by plaintiff that Dewar's death does not change the basis upon which this case was tried or upon which relief was granted; that the exercise by defendant of its options to acquire Dewar's stock will not raise legal questions not considered or decided by this Court; and that defendant is simply asking the Court to reconsider matters which it has already decided. It is pointed out that the agreements containing the option provisions were in evidence when this Court entered its judgment herein, and that the Court therefore was fully aware of the possibility that defendant might some day acquire Dewar's interests in British Timken and French Timken. Plaintiff does not take into account the tremendous difference between a mere contingent right to acquire controlling interests in those companies, a mere possibility of making

them true subsidiaries, and the actual fact of such control. Defendant might have desired to acquire these interests prior to this time, but until now it has never had an absolute right to do so. Having entered into the joint venture with Dewar, it was bound to carry that venture through to completion, and had no way of compelling Dewar to sell his interests. Now it does have such right, and is actively proceeding to acquire those shares.

Plaintiff argues (page 2 of its memorandum) that the very acquisition of Dewar's shares is prohibited by the decree entered by this Court, and that the agreements giving defendant the right to acquire those shares are in full force and effect only because a stay of all the provisions of the final judgment has been granted pending appeal (plaintiff's memorandum, page 3). It is clear, therefore, that plaintiff does not deny that defendant may now lawfully acquire Dewar's shares in British and French Timken, though admittedly such acquisition may be at the peril of having to dispose of all the shares should the judgment remain unmodified. The defendant's action is understandable. Upon Dewar's death it was simply placed in the position of having to act within a limited time to exercise its options, or very probably lose the right to acquire control of subsidiaries, one of which it had helped to establish, and both of which it had assisted in developing, with financial and technical aid. It naturally chose to take the necessary action to protect its rights.

The change in the factual situation, then, is quite a significant one. How does it affect the legal questions involved?

This case was commenced by the plaintiff, and tried and decided by this Court, on the theory that three independent companies, being actual or potential competitors in a tapered roller bearing market, had entered into contracts, combinations and conspiracies to restrain competition. (Court's memorandum opinion, pages 53 and 58.) The Court stated that

"Defendant did not acquire British and French Timken" (memorandum opinion, page 53), and

"did not build plants in Europe or *purchase subsidiaries* abroad"

(memorandum opinion, page 58); and the Court therefore rejected defendant's analogy between this case and *United States vs. Columbia Steel Company*, 334 U. S. 495 (1948). The plaintiff made no charges of a monopoly, or an attempt to monopolize on the part of defendant, and the Court made no findings relating to such a charge.

Now, however, the three companies are brought into a parent-subsidiary relationship; and it is clear that a judgment based on the theory of a conspiracy between independent companies should no longer apply to the new legal relationship. Now, the legal questions involved are those presented by the corporate integration cases, such as *Standard Oil Company vs. United States*, 221 U. S. 1 (1911); *United States vs. Paramount Pictures*, 334 U. S. 131 (1948); *United States vs. Aluminum Company of America*, 148 F. (2d) 416, *supra;* and *United States v. Columbia Steel Co.*, 334 U. S. 495, *supra.* These questions apparently were not considered by this Court,[2] as they were not necessary to its decision under the theory on which the case was tried. Further inquiry into these questions is now essential to a proper decision in this case.

The *Columbia Steel* case sets forth most concisely the method of analysis in a case where corporate acquisitions are alleged to result in unreasonable restraints of trade, or to lead to monopoly. In that case the Supreme Court stated (page 527):

"'The same tests which measure the legality of vertical integration by acquisition are also applicable to the ac-

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[2] Although the corporate integration cases were referred to by the defendant by analogy, they apparently were thought inapplicable by the Court for the reasons indicated in its distinguishing of *United States v. Columbia Steel Co., supra.*

quisition of competitors in identical or similar lines of merchandise. It is first necessary to delimit the market in which the concerns compete and then determine the extent to which the concerns are in competition in that market. If such acquisition results in or is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act. In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed."

Somewhat similar is the following declaration from the *Paramount Pictures* case (page 174):

"In the opinion of the majority the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived or (2) the power it creates and the attendant purpose or intent. First, it runs afoul of the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs. United States v. Reading Co., 253 U. S. 26, 57; United States v. Lehigh Valley R. Co., 254 U. S. 255, 269, 270. Second, a vertically integrated enterprise, like other aggregations of business units (United States v. Aluminum Co. of America, 2 Cir., 148 F. 2d 416), will constitute monopoly which, though unexercised, violates the Sherman Act provided a power to exclude competition is coupled with a purpose or intent to do so. As we pointed out in United States v. Griffith, 334 U. S. 107, n. 10, size is it-

> self an earmark of monopoly power. For size carries with it an opportunity for abuse. And the fact that the power created by size was utilized in the past to crush or prevent competition is potent evidence that the requisite purpose or intent attends the presence of monopoly power. See United States v. Swift & Co., 286 U. S. 106, 116; United States v. Aluminum Co. of America, supra, 148 F. 2d at page 430. Likewise bearing on the question whether monopoly power is created by the vertical integration is the nature of the market to be served (United States v. Aluminum Co. of America, supra, 148 F. 2d at page 430), and the leverage on the market which the particular vertical integration creates or makes possible."

And in the *Aluminum Company* case, *supra*, in connection with its discussion of the percentages of aluminum production which were controlled by Aluminum Company of America, the Court stated:

> "Hence, it is necessary to settle what we shall treat as competing in the ingot market."

Thus, it is seen that the first problem for the Court in these cases is "to delimit the market"; next, to determine "the percentage of business controlled" in this market by the integrated corporations; third, to examine the "strength of remaining competition"; fourth, to inquire into the motives behind the acquisition—whether they be "business requirements or purpose to monopolize"; and, fifth, to determine such additional questions as "the probable developments of the industry, consumer demands, and other characteristics of the market."

This Court in this case made certain findings with respect to the size and volume of sales of defendant, British Timken and French Timken, and the respective percentages which each produced of tapered roller bearings and antifriction bearings in their respective countries (pages 3, 4 and 5, memorandum opinion), and made general findings to the effect that these figures showed "the dominant position

of defendant, British Timken and French Timken both in the tapered and anti-friction bearing industry." (Memorandum opinion, pages 5, 12 and 13.) The Court never made it entirely clear, however, which percentage it considered as showing defendant's competitive advantage—whether that concerning tapered rollor bearings only or that including all anti-friction bearings, and even stated (memorandum opinion, page 12):

"It is of no moment what the precise figures were."

That may have been true so long as the Court was dealing with three companies on the basis that they were "independent." However, considering the new integration of the three companies and the statements of the Supreme Court in the *Columbia Steel* case, such findings as this are now required for a proper decision of this case.

The Court made no findings regarding the competitors of defendant, British Timken and French Timken, as to their size, strength and sales. There were certain general findings with regard to the alleged participation of British Timken and French Timken in cartel agreements with some of their competitors (memorandum opinion, page 46) and others as to the manner in which they acted with the defendant with respect to other competitors (memorandum opinion, page 46). Nowhere in its opinion, however, did this Court make any findings as to the size and strength of the competing companies. Yet these findings now become of the greatest significance in determining whether defendant's control of British Timken and French Timken constitutes an unreasonable restraint of trade.

The Court also gave little attention to the question of defendant's motives in acquiring the interest in British Timken and in cooperating in the establishment of French Timken, because the Court found (memorandum opinion, page 53) that the defense of absence of intent to restrain trade and of the existence of good business reasons was not valid in such cases. The *Columbia Steel* and *Paramount*

Pictures decisions, quoted above, teach us otherwise where a corporate integration is involved.

The Court did make some general comments with regards to defendant's intent to restrain trade, and cited one letter (not involving defendant's relations with British and French Timken) (memorandum opinion, page 54) to show such an intent with respect to domestic trade; but we submit that to determine the legality of defendant's acquisition of control of these companies more detailed findings, based upon a more thorough examination of the purposes behind defendant's acquisitions, should be made by the Court.

Finally, the Court made few, if any, findings with regard to the probable developments of the industry, consumer demand, and other characteristics of the market.

Furthermore, we submit that the tests of what constitutes an "unreasonable restraint of trade" cannot be the same with respect to parent and subsidiary as in the case of independent corporations. It is true that in its first decision in *United States vs. Yellow Cab Company*, 332 U. S. 218 (1947), the Supreme Court said:

> "The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act."

Yet, in the subsequent *Columbia Steel* case, the Court recognized the obvious fact that:

> "A subsidiary will, in all probability, deal only with its parent for goods the parent can furnish."

and declared:

> "That fact, however, does not make the acquisition invalid. When other elements of Sherman Act violations are present, the fact of corporate relationship is material and can be considered in the determination of whether restraint or attempt to restrain exists."

For this further reason, then, we submit that this Court should reconsider its judgment herein in considera-

tion of defendant's acquisition of the controlling interest in British Timken and of complete ownership of French Timken.

In these respects, we believe that the changed circumstances in this case may affect not only the question of the remedy which is appropriate, but even the basic question of whether a violation of the Sherman Act now exists which requires the intervention of this Court; and thus present questions not previously before this Court.

III.

THE FORM OF THE JUDGMENT.

In the first instance, we wish to make it clear that our reference to Rule 60(b) of the Federal Rules of Civil Procedure is not intended to imply that it affects the substantive rights of the defendant to relief from the judgment. We do contend, and, as we read plaintiff's memorandum, it does not deny, that under this rule this Court has power to grant relief from a final judgment, on motion timely made, when:

> "it is no longer equitable that the judgment should have prospective application."

or when there is:

> "any other reason justifying relief from the operation of the judgment."

The rule simply provides a convenient procedure for securing relief from a final judgment.

The cases which plaintiff has cited to show the application of Rule 60(b) do not exhaust the situations in which relief from a judgment may be granted under the rule, and they certainly do not contain any discussions by the various courts which would preclude such relief in the present case.

The most important authority cited by the plaintiff on this aspect of the motion is *United States vs. Swift & Company*, 286 U. S. 106 (1932). The first point to be noted

with regard to that case is the fact that it begins by affirming "the power of a court of equity to modify an injunction in adaptation to changed circumstances" (page 114). The second point is that the decree involved in that case was a consent decree; and, while the Supreme Court makes some statements which indicate that there is nothing about a consent decree which affects the power of the Court with respect to modification, and though the decree was previously attacked upon appeal in the Supreme Court, yet it is clear that this factor of consent had much to do with the Court's unwillingness to have the decree modified. For example, at page 112 of its opinion the Court remarked:

> "The expectation would have been reasonable that a decree entered *upon consent* would be accepted by the defendants and by those allied with them as a definite adjudication setting controversy at rest."

Again, at page 115, it is commented:

> "The defendants, controlled by experienced business men, *renounced* the privilege of trading in groceries, whether in concert or independently, *and did this with their eyes open.*"

And at pages 116-117:

> "We do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition. Instead, *they chose to consent,* and the injunction, right or wrong, became the judgment of the court."

And finally at page 119:

> "The difficulty of ferreting out these evils and repressing them when discovered supplies an additional reason why we should leave the defendants where we find them, *especially since the place where we find them is the one where they agreed to be.* * * * Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation *with the*

consent of all concerned. * * * Wisely or unwisely, *they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed,* and the decree of the court confirmed the renunciation and placed it beyond recall."

The other statements by the Court in the *Swift* case, then, must be read in the light of the above quoted remarks, and were not intended to interfere with the sound discretion of the district courts in framing their decrees in anti-trust cases (*United States vs. Crescent Amusement Company,* 323 U. S. 173 (1944)), or in adapting them to changed circumstances, when a consent decree is not involved.

Another important difference between this case and the *Swift* case is that the modification of the decree is sought here prior to any consideration of the case whatever by the Supreme Court. In a sense, so long as the Supreme Court has not acted in this case, it is still a matter of this Court's discretion in framing the decree initially, rather than modifying it after it has already gone into operation and, indeed, after it has been confirmed by the Supreme Court upon attack by the defendant in that Court.

Admittedly, it is an unusual thing for circumstances to change sufficiently to cause a court to modify its judgment once rendered, even before the case can be heard in an appellate court; but we believe that the changed situation as to ownership and control of British Timken and French Timken, thrust upon the defendant, as it were, by events beyond its control, is of sufficient importance that this Court will wish to reconsider its exercise of discretion in the framing of the decree in this case.

With respect to possible modification of the divestiture provisions of the judgment, plaintiff urges that any modification which would exclude these provisions would be contrary to certain statements of the Supreme Court in *United*

States vs. Paramount Pictures, 334 U. S. 131 (1948). The Court there first stated:

> "To the extent that these acquisitions were the *fruits of monopolistic practices or restraints of trade,* they should be divested."

Quite clearly, defendant's acquisitions of interests in British Timken and French Timken cannot properly be characterized as "the fruits" of any illegal practices. Even if it is claimed that the illegal practices which the Court found are to be traced back to a time prior to the original acquisitions, yet in no sense were defendant's acquisitions the consequence of any prior illegal acts. The idea of "the fruits" of illegal practices denotes that by the exercise of monopolistic power or by other improper competitive practices the defendant has been able to force competitors out of business and to buy up the competing concerns' property. There is no such factor in this case with respect to defendant's purchase of interests in British Timken and French Timken.

The Supreme Court in the *Paramount Pictures* case next spoke of properties which, though

> "lawfully acquired * * * have been utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends of the conspiracy."

But it has never been claimed that defendant, prior to the present time, had control of either British Timken or French Timken. On the contrary, this Court has found (memorandum opinion, page 57) that

> "British Timken and French Timken retained their corporate independence and jealously guarded their interests in dealing with defendant."

How can it be said, then, that defendant "utilized" its interests in those companies "as part of the conspiracy to eliminate or suppress competition"?

The argument previously advanced by the plaintiff to justify divestiture of these interests has been that they

served as "inducements" to the defendant not to compete with British Timken and French Timken. (Plaintiff's Brief in Support of Its Proposed Final Judgment, pages 5 and 6). But that argument was based on the assumption that contractual restraints of competition between three "independent" companies, and possible continuance thereof, must be removed. Now that defendant will have absolute ownership of French Timken, and majority voting control of British Timken, the fact that its ownership may induce it not to compete with its subsidiaries does not make such ownership illegal, as the Supreme Court held in the *Columbia Steel* case.

The arguments presented in the *Paramount Pictures* case for divestiture, therefore, have no application to the present case, particularly due to the changed ownership situation. None of these arguments are convincing reasons why defendant should not be permitted to acquire and hold the controlling interest in British Timken and the entire voting stock of French Timken. It should be remembered that this is not a case where it is alleged that the defendant alone, or in combination with British Timken and French Timken, has a monopoly within the anti-friction bearing industry in any area whatever. There have been no serious charges that defendant has been able to exercise power to destroy competitors, and in fact there could be no basis for such a charge. In the *Paramount Pictures* case, and indeed every other case where divestiture has been ordered, the defendant was not permitted to *retain* properties which permitted it to exercise this monopolistic power, and divestiture was therefore necessary to prevent this. No such considerations require divestiture in this case.

Plaintiff denies the validity of the *National Lead* case, *United States v. National Lead Company*, 63 F. Supp. 513, aff'd. 332 U. S. 319 (1947) as authority for an alternative form of decree requiring defendant either to divest itself of its holdings in British Timken and French Timken, or

to acquire controlling or complete interests, respectively, in those companies. Certain statements are made which purport to show that the decree entered in such form in that case was really so qualified by extraneous understandings of such a nature that, in fact, the defendant had no such choice as the language of the decree would indicate. It is further said that only one acquisition was ever made under this decree, and that this one was "of relatively minor importance to the restoration of competition." Among other things, it is stated that, because of patents owned by the company acquired, *National Lead* could have been excluded from the Canadian market. *The same may be true in this case with regard to imports by the defendant* into *Great Britain, France and other territories,* if defendant is enjoined from enforcing any rights under its agreements with British Timken and French Timken, by reason of the trademark problems involved, as well as the international economic situation which has been analyzed at length heretofore. It is stated that "a difficulty existed to transfer of the Canadian company's stock to a stranger, since it was a private company." *There are many more difficulties,* practical as well as legal, in connection with the disposition of defendant's interests in British Timken and French Timken.

We submit that there is present here every reason which may have existed in the *National Lead* case for allowing the defendant, as an alternative to divestiture, to acquire and hold the controlling interest in British Timken (the remaining shares being widely held, no other holder being an alleged co-conspirator) and the entire ownership of French Timken. Plaintiff argues that defendant is "somewhat late" in suggesting the alternative form of decree. If any explanation is needed for defendant's failure to suggest this, it is sufficient to say that until now the situation has never been such that a decree in that form would have meant anything as a practical matter. Now, by reason of Dewar's death, defendant could, if permitted by this

Court, make effective the alternative provisions of such a decree.

CONCLUSION.

We believe that the Court, in deciding this motion, is faced with two sets of problems: first, the procedural problems of how the fact of the changed circumstances may be made part of the record in this case, and by what court the effect of those changed circumstances on the decree in this case is now to be considered; and second, the substantive problem of what, if any, relief defendant should be given by reason of the changed circumstances. We believe we have shown that the procedure which this motion asks this Court to follow is the correct and most orderly procedure for these purposes.

Beyond that, of course, the Court cannot really decide this motion until evidence has been introduced and arguments more fully presented on the substantive questions involved. In this sense, arguments now directed to the substantive questions are premature, except as they go to demonstrate that there is, or is not, matter of sufficient importance to warrant the Court's reconsideration. We believe that this Court will recognize that there are new questions of importance in this case, and will wish to give them full consideration after receiving evidence on these questions.

In the final analysis, the question in this case will now become one of whether an American corporation may operate foreign subsidiaries which it does not wholly own, and of which it has acquired control following an intermediate step in which it jointly participated with a foreign citizen in the ownership and management of the foreign companies. There are many other American companies which have foreign investments representing much less than 100 per cent ownership of their foreign affiliates. Such arrangements do not unreasonably restrain trade, but

rather promote it by encouraging the development of the economies of the foreign countries, which has now become one of the basic objectives of the foreign policy of the United States. In the long run, it is such development which will promote trade between the United States and foreign countries and will inure to the greatest benefit of this country.

The necessity of participating in foreign markets by means of affiliated companies established in the respective countries has been recognized by many business organizations, including such an international competitor of this defendant as the Swedish bearing company, SKF, whose size and power were shown in the trial of this case. As the Supreme Court said in the *Columbia Steel* case,

> "extension of that industry requires that the existing companies go into production there or abandon that market to other organizations."

This leaves the alternatives of acquiring existing facilities in the new territory, or creating entirely new ones. The choice of the former method should not be forbidden unless it will unreasonably restrain competition in the entire industry, under the tests laid down in the *Columbia Steel* case, *supra*.

A decision on questions of this importance to the American economy should not be made on the basis of dialectics or abstract logic, but in full recognition of the economic realities involved. We submit that trade by the defendant and other companies in foreign commerce will not be promoted by depriving them of foreign investments which they have developed over many years, and expecting them either to attempt to compete in the foreign market solely by exporting products of domestic establishments, or to embark alone to establish foreign factories, and systems of distribution. Rather, they should be permitted, wherever reasonably possible and wherever they do not actually restrain trade which would otherwise flourish, to develop

their foreign trade along such lines as the practicalities of their particular problems require. Only by so doing can the Sherman Act be made a real instrument for the removal of restraints of trade rather than a device for imposing restraints and discouraging foreign trade.

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